Supreme Court, U.S.
FILED

No. 03 206 JUN 9 - 2003

In The

Supreme Court of the United States

In Re: Summary Judgement of Retaliation/Race Discrimination Case

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KELVIN J. HURDLE,
Petitioner.

v.

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTIONS PRESENTED

1. Is the right to due process denied the plaintiff possessing a right to sue letter for discrimination; when summary judgment is granted base on preclusive effect & collateral estoppels for discrimination, and the issues was never tried in a Federal or State Court?

2. Can full faith and credit be given to a grievance hearing where the hearing officer clearly see and documents in the record, that the evidence of the employers testimony is conflicting along every line of questioning, and still rules in favor of the employer?

3. Does a claim of retaliation, filed originally in the Federal Court, have priority jurisdiction over a grievance step of an administrative judicial review? Additionally, should an administrative judicial review of retaliation, ordered by the Federal Court, preclude the plaintiff's rights to litigate his discrimination complaint in Federal Court?

4. Should preclusive effect be granted to a grievance step of judicial review in Virginia; when Virginia law only gives preclusive effect to complaints actually tried or determined on the merits in a state court? Additionally, if the Federal Court allowed the continuance of a Title VII retaliation case, and ignored a motion for dismissal base on collateral estoppel of a grievance hearing; should that Federal Court stay the existing federal procedures and order the plaintiff to proceed with the administrative step of judicial review as motioned and requested by the defendant? Should that Federal Court subsequently deny the plaintiff the right to proceed with his complaint in Federal Court by reason of collateral estoppel?

PARTIES TO THE PROCEEDING

Petitioner:

Kelvin J. Hurdle,

Respondent:

Virginia Department of Environmental Quality,

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The opinions of the United States Court of Appeals for the Forth Circuit in Kelvin J. Hurdle, Plaintiff-Appellant, versus The Commonwealth of Virginia, Department of Environmental Quality, Defendant-Appellee Case No. 02-?138 are unpublished. Copies of the Opinions are included in the Appendix at Appendix page 1a. The Orders of the District Court for the Eastern District of Virginia are included in Appendix at Appendix page 3a.

JURISDICTION

The United States Court of Appeals for the Forth Circuit filed its Mandate on the judgement entered by the court on 12/19/02. A timely filed Petition for Rehearing and Rehearing En Banc was denied on March 11, 2003 (Appendix 5a). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The court's jurisdiction is invoked pursuant to 28 U.S.C §§ 1254 (1) and 2106.

STATUTORY PROVISIONS INVOLVED

This action is brought on behalf of Kelvin J. Hurdle seeking to implement the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. This Court has subject matter jurisdiction pursuant to (a) 28 U.S.C. § 1331, because the case arises under the Constitution and laws of the United States; (b) 28 U.S. C. § 1343 because this action seeks redress and damages for violation of 42 U.S.C. § 1983 and 1985, and in particular, the due process and equal protection

provisions of the United States Constitution, including the rights protected in the Fifth, Seventh Ninth and Fourteenth Amendments.

This Court has jurisdiction of the action under 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1345.

Venue is appropriate in this judicial district under 28 U.S.C. § 1391 (b), because Defendant is a state agency functioning in Richmond, Virginia, and a substantial part of the events giving rise to this Complaint occurred in Richmond, Virginia. Defendant the Department of Environmental Quality is a state agency maintained and funded in significant part by the Commonwealth of Virginia.

STATEMENT OF THE CASE

Hurdle is an African-American male that has made several attempts to obtain an attorney [Appendix 7a]. The one attorney that Hurdle obtained, after over 10 different consultations, worked on the case for 3 weeks and then refunded the total 5,000.00 retainer declaring that the decision for the Federal Complaint case has already been made.

Hurdle was employed by DEQ since 1988, and was hired as a Geologist. He was promoted in 1989 to the position of Geologist C, then again in 1996 to the position of Training and Development-Manager ("TD Manager"). Hurdle participated in protected activity from December 1999 through December 2000. On January 21, 2001 Hurdle was terminated for allegedly not meeting the minimum expectations in any category of his job performance. Hurdle filed an administrative

grievance for arbitrary and capricious performance evaluation given in retaliation. Hurdle's attorney for the grievance, never attempted to prove any part of the framework for retaliation and got angry when Hurdle requested such an action. Hurdle received a right to sue letter for discrimination and retaliation January 23, 2001 and filed for, and obtained an amended right to sue letter for retaliation and discrimination September 2001. To implement the administrative process that includes the judicial review, Hurdle filed an administrative grievance that took placed May 31 and June 1, 2001. Hurdle filed for the judicial review July 2001. The Department of Environmental Quality ignored and failed to timely respond and submit the grievance records to the State Court. Hurdle then filed his amended complaint in Federal Court August 1, 2001 to pursue his claim of retaliation, hostile work environment and discrimination. In September of 2001, the Federal Court issued an order-instructing Hurdle to pursue the judicial review of the administrative process, upon the motion of DEQ. Hurdle contended that such a pursuit was a waste of time but followed the court's order. The State Court upheld the hearing officer's decision. The Federal Court continued the Federal Case and allowed discovery and depositions to be taken. Motions were filed for summary judgment by DEQ and in opposition to summary judgment by Hurdle. A prima facie case was shown and proven by Hurdle for retaliation, discrimination and a hostile work environment. The Federal Court granted Summary Judgment for DEQ on the grounds of preclusive effects of the state court judicial review that was not performed on the merits or exactly the claims file for in the Federal case. The

issues of discrimination or retaliation were not tried in the state court. The preclusive effect given to the judicial review of the grievance hearing is in conflict with Virginia Law and previous cases that have been ruled upon by the United States Supreme Court. Moosavi v. Fairfax County Bd. Of Educ., 666F.2d 58 (1981). Haring v. Prosise, __US__,103 S. Ct. 2368, 76 L.ED.2d 595 (1983)

Additionally, neither the discrimination issue nor the hostile work environment issue filed in Hurdle's Federal complaint was ever a part of the administrative grievance that had an administrative judicial review. Therefore, the administrative grievance should not be given preclusive effect, as clearly noted by Virginia Law and as indicated by the previous cases ruled upon by the United States Supreme Court. Allen v. McCurry, 449 U.S at 96, 101 S. Ct at 415-418 n.7 Patsy v. Florida Board of Regents, 457 U.S. 496, 501-502, 512-513,and n.13 102 S.Ct 2557 2560-61,2567, and n.13 73 L.Ed.2d 172 (1982)

REASONS FOR GRANTING THE PETITION

The Appropriateness of Defendants' Motion for Summary Judgment. DEQ'S motion for summary judgement is only appropriate if there is no genuine issue as to any material fact, which would entitle defendant to judgement as a matter of law. Fed. R. Civ. P. 56(c). Since DEQ is the moving, the burden is on it to show the absence of any genuine issue of material fact. The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to Hurdle since he is the party opposing the motion. Ross, Id., at 364. Only where it is

"perfectly clear that there are no issues in the case" is summary judgement proper. As the nonmoving party, Hurdle is entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from the evidence drawn in his behalf; and to be given the benefit of all favorable legal theories invoked by the evidence as considered. Ross at 364.

Federal Rule of Civil Procedure 56(C) required that the Court enter judgment against a party who, "after adequate time for discovery ... fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp.v. Catrett, 477 U.S. 317,322 (1966). The essence of the inquiry that the Court must make is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 77 U.S. 242, 251-52 (1986). Summary judgement is proper "if the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." Id., at 248

Hurdle is entitled to a trial by jury for his Title VII claims of discrimination, hostile environment and retaliation. Hurdle clearly expressed in open argument September 6, 2002 that the hostile work environment, Title VII discrimination, or several of the issues of retaliation or were never apart of the original grievance and therefore not a part of the judicial review Appendix [10a-12a]. Hurdle requested a jury trial in

the filing federal complaint for the Title VII claims. However, by a request motion of the defendant and order of the federal court, Hurdle was required to proceed to the time barred administrative step of judicial review. Subsequently, the Federal Court has given the grievance hearing held between Hurdle and DEQ preclusive effect because the decision was reviewed by a State Court of Virginia. Hurdle has been denied the right to a trial by jury for his Title VII claims. Hurdle's constitutional rights to Due Process and Equality Under the Law have also been denied.

Congress expressly recognized in both §706 (b) and §706 (c) that a complainant could bring a Title VII suit in federal court despite the conclusion of a state "proceeding." As Justice Blackmun has written in Kremer v. Chem, 456 U.S. 461 (1982), "The Court must acknowledge, see ante, at 470-471, n.8, when Congress referred to state "proceedings", it referred to both state agency proceedings and state judicial [Page 489] review of those agency proceedings". "For a State Court review is merely the last step in the administrative process, the final means of review of the state agency's decision".

The Fourth Circuit had no difficulty distinguishing a state court trial on a discrimination claim from [page 496] state court affirmance of state agency's determination. Moosavi v. Fairfax County Bd of Education. 666 F2d 58 (1981). Unless and issue was actually litigated and determined in a formal judicial proceeding, Virginia law will not treat it as final. See e.g. Luke Construction Co. v. Simpkins, 223 Va. 387, 291 S.E.2d. 204 (1982). Eason v. Felson, 442 U.S. 127, 139, n.10, 99 S. Ct 2205.2213 n.10, 60 L Ed2d 767 (1954)

Haring v. Prosise, __U.S. __, 103 S. Ct. 2368, 76 L.ED.2d 595 (1983). To render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined. That is, "that the verdict could not have been rendered without deciding that matter." Cf Block v. Commissioners, 99 U.S. 686, 693, 25 L.Ed. 491 (1879); Segal v. American Tel. &Tel Co. 606 F.2d 842, 845. n2 (CA 1979).

The administrative grievance held at the Department of Environmental Quality (DEQ) should not be given "Full Faith and Credit" and therefore not given preclusive effect. The Hearing Officer/Commissioner clearly observed and denoted flags of inconsistency in DEQ responses in every direction of questioning, (Def. Encl. X pg. 110 line 14-15). [Appendix 8a] Montana v. United States, 440 U.S. 147 164, n.11, 99 S.Ct 970, 979, n, 11, 59 L.Ed.2d 210 (1979). The hearing officer did not address the respective facts in his opinion and ruled for DEQ despite the inconsistency is DEQ answers of questions. Additionally, the hearing officers' denied Hurdle due process when he refused to allow seven exhibits into the record. Full faith and credit can only be given after the plaintiff is allowed to present all exhibits in the entirety. Montana v. United States, 440 U.S. 147 164, n.11, 99 S.Ct 970, 979, n, 11, 59 L.Ed.2d 210 (1979) Hurdle wasn't allowed the respective opportunity. Moreover, the Hearing officer spoke harshly to Hurdles attorney and said either you (the attorney) are going to represent Mr. Hurdle or he will have to represent himself (Def. Encl. X pg.6 line 18-19). Unfortunately, Hurdle has been forced to represent

himself. Hurdle has found no attorney willing to stand up for Hurdle rights to the law in the fourth circuit. Appendix [7a]

The proceedings involve two question of critical importance:

I.a. Can preclusive effect be given to issues not properly before the administrative hearing or the administrative act of judicial review? Discrimination or Hostile Environment was not before the grievance hearing administrative law judge and therefore not before the Richmond Circuit Court. Haring v. Prosise _ US __,103 S. Ct. 2368 76 L.ED.2d 595 [1983]

b. Does Federal Court have precedent over a state court when a Title VII action is filed first in Federal Court and the plaintiff clearly states that he prefers to proceed in Federal Court? Is it appropriate for the District Court to stay the procedures of Federal Court to initiate a judicial review State Court action at the request of the defendant and in opposition to plaintiff request? Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985).

II. Prima Facie Case

Kelvin Hurdle ("Plaintiff") submits the following responses to establish a prima facie case in the respective case.

Harassment Claim

There is no dispute that Hurdle experienced verbal abuse from Howard Freeland (Encl.XXXVII S. Beverly. 336. trans.hearing pg. 28 lines-15-16) (Encl. XXII.pg. 22 line 13-14) He also experienced disparate treatment as clearly described in the denial of access to the job during the audit (Def.Encl.X.Exh. #19.1of 1) and relative to the discussions of Page County groundwater flow (Encl XXXIII) (Encl.X.Exh. #24.10&11of112). Additionally, the reports by Lawrence Farmer relative to the alteration of work documents, more than adequately prove workplace sabotage (Exhibits XVI and XVII). Verbal abuse, disparate treatment, and workplace sabotage definitely support a harassment claim. (Raniola v Bratton, 2nd Cir, 81 EPD ¶ (40,706). All positive inference of the respective facts is to be viewed in the most favorable light of the Plaintiff and thereby summary judgment should be denied and a trial date set. Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985).

Retaliation Claim

a. Treacy re-assigned Paylor as the Ultimate Decision Maker with respect to Hurdle (Encl XXVI pg.9 line 13-20) and Treacy made Karen Sismour aware of Hurdle's participation in protective activity (Treacy Depo Encl. XXV1 pg.8 lines 9-18,)

b. (Paylor Depo Encl XXX pg.9 lines 5-7, and pg.39 lines 18-19) Paylor testifies that Ms. Karen Sismour was the Ultimate Decision Maker (Paylor Depo Encl. XXX pg. 54 line 1-25)

c. Ms. Romanchik signs sworn affidavit that she recommended that Hurdle be terminated. (Def. Encl. IV para.12)

d. They all took part of the group decision that left Ms. Sismour standing as the Ultimate decision-maker that sign off on the recommendation for terminating Hurdle without **an independent investigation**.

(Def.Encl.X.griev.tr.pg 284 line 6-12) Paylor refuse to cover the performance issues with Hurdle point by point as requested by e-mail (Paylor Depo.Pg.12 lines 1-12) (Paylor exhibit 5) and thereby refuse to do an **independent investigation** of the performance issues.

Paylor knew that there were some management issues that needed to be addressed as well as communication problems. (Paylor 336 Depo pg. 30 lines 15-25 and pg. 31 lines 4-6) (Paylor encl. XXII pg.20 lines 4-15).

e. Romanchik recommended terminating Hurdle and boastfully expressed halted that did not call or check with anyone about the validity of the alleged customer service complaints when questioned by Mr. Scott Crowley. (Def.Encl.X Romanchik griev. tr page 83 lines 15-22) Romanchik never performed **an independent investigation.**

f. Ms. Sismour terminated Hurdle knowing that there were communication problems and did not perform an independent investigation but simply accepted evidence as it was presented to her. (Sismo Depo.pg. 4 lines 1-3 and lines 8-10)

g. Evidence in the record clearly shows that documents were being changed and even Hurdle signature on work documents were being signed by someone within the organization other than Hurdle. (Enclosure XVI)

h. Treacy, Paylor, Sismour, Freeland, Romanchik, and Syverson were all aware of Hurdle participation in protected activity. (Def.Encl.X. griev.tr.pg. 284 line 6-12)

DEQ management participated in the shell game with respect to the ultimate decision-maker. Such actions infer causation with respect to the ultimate decision-maker in a retaliation case (Willis, 118F.3d at 547). Paylor was assigned the Ultimate decision making responsibilities and didn't respond to Hurdle's request to review his performance point by point. (Paylor Depo Encl. XXX pg. 12.ln 10-12). Paylor states that he was not the ultimate decision-maker, and that Karen Sismour was. (Paylor Depo 06/02). Proof of such manipulation in decision-making is adequate to show intent to retaliate (Willis, 118F.3d at 547). They all met conversed with Karen Sismour (Def.Encl.X griev hr.tr.pg 284 line 6-12) and terminated Hurdle because of participation in protected activity. The panel of Treacy, Paylor, Sismour and Romanchik, decided to terminate Hurdle without any independent investigation. They all acted as the supervisor's cat's paw. Therefore, the innocence of the panel members(Treacy, Paylor, Sismour, and Romanchik) should not spare the agency from liability and thereby establishing a causal link. [Shager v Upjohn Co, 913 F.2d 398, 405 (7th Cir.1990)], (Willis, 118F.3d at 547) and Azzaro v. County of Allegheny, 110 F.3d 968, 973-74 (3d Cir. 1997). These actions would not have occurred against Hurdle if he had not participated in protected activity and therefore the respective retaliatory acts have occurred.

Additionally, Hurdle requested Mr. Paylor (Deputy Director) respond to the details of the Appeal of Hurdle's performance evaluation. No ultimate decision-maker or relevant decision-maker did an independent investigation as to Hurdle's performance evaluation. Additionally, Mr. Hurdle improved in his performance from September 1999 until September 2000 but his ratings were marked lower in September 2000 after he filed a retaliation lawsuit in May 2000. These actions would not have occurred against Hurdle if he had not participated in protected activity and therefore the respective retaliatory acts have occurred.

All the respective managers knew that there were management issues that needed to be addressed and that there were communication problems (Paylor encl. XXII pg.20 lines 4-15). They all were aware that Hurdle had participated in protected activity Paylor testimony (Treacy Depo encl. XXV1 pg.8 lines 9-18 and pg.39 lines 18-19); Treacy testified that he communicated to Sismour about Hurdle's grievance of the comp time issue which occurred before Hurdle obtain the right to sue on February 9, 2000 (Treacy Depo encl. XXV1 pg. 39 lines 13-18). Paylor and Romanchik were present in a meeting where Hurdle spoke out against racial discrimination December 1999. After Hurdle received the right to sue in February 9, 2000. Freeland testified that he began a strict scrutiny of Hurdle's performance in February 2000 (Def. Encl. X. griev. tr.pg.176 line 20-25 and pg.177 lines 1-6). If it had not been for the receiving of the February 9, 2000 right to sue letter, the May 12 filing of a grievance, or filing the May 29, 2000 discrimination lawsuit, Hurdle would not have been giving the failing interim

evaluation May 31, 2000 or the "Does Not Meet Expectations" in every job element in September 2000. Additionally, Hurdle would not have been placed on a 90-day re-evaluation plan that determined that Hurdle did not meet the 4-hr maximum requirement in response to draft letters. Hurdle met the 4-hr maximum requirement during the normal evaluation period. If it had not been for Hurdle filing grievance for fraudulent activity and participating in court procedures, Hurdle would not have received an unwarranted Group II Notice on October 21, 2000 for an action that occurred October 3, 2000. When Syverson was asked why didn't he issue the group II notice sooner, he replied that he didn't know. If Hurdle had not participated in the court procedures December 11, 2000; He would not have been terminated January 16, 2001.

Discrimination

The Defendants defense of unsatisfactory performance is a sham and is not supported by the record. Additionally, discriminatory practices, such as the fraudulent changes of documents, have rendered the record mis-leading and the record itself is a mere pretext for discrimination. Hurdle was required to handle more than twice the workload as whites similarly situated between the annual report periods of March 1, 2000 to July 5, 2000. (Griev. tr.pg. 90 lines 3-6) (griev. tr.pg. 96 lines 1-4). Freeland testified that any errors made in 2000 were not worst than the errors made in 1999. (griev. tr.pg. 179 lines 8-20) Hurdle rating in 1999 was meets expectations (1999 Performance Evaluation), but was does not meet the minimum expectations in 2000 even though Hurdle

improved and was meeting the four hour time limit expectation. Leslie Romanchick testified that even if Hurdle had excellent quality in his work, he probably wouldn't have received and excellent rating (griev. tr.pg. 110 lines 8-12). She testified that quantity wasn't an issue. Romanchick testified that Hurdle had more than twice the sites than other white employees had with one or two year's experience. (Griev. tr.pg. 90 lines 3-6) (Griev. tr.pg. 96 lines 1-4). Paylor's alleged review of the performance evaluation could not distinguish a technical v. non-technical error. (Paylor Depo. pg. 24 line 5-8) Hurdle was told he would only be accountable for technical errors (Freeland griev.tr.pg. 134 line 8-10) The Hearing Officer/Commissioner commented with respect to Ms. Romanchick's depositional answers that there were contradictory flags in every direction. (Hearing Officer Page 110 lines 14-15). Hurdle was denied the same opportunity granted the whites similarly situated that had seniority. (Hurdle Depo). Hurdle was given complex sites during the initial job assignments where whites similarly situated were not. Hurdle complained about inadequate training (Paylor Exhibit), intentional mis-communications (Appeal of Performance Paylor Exhibit) and fraudulent moving of documents. (Farmer Enclosure XVI). Thus proving that any unsatisfactory performance is attributable to the (Defendant) DEQ, rather than any inherent inadequacy of the Plaintiff. Whites similarly situated with poor performances have been found jobs (Peggy Hawkins Affidavit #2). Hurdle was the only employee ever terminated using DPT policy 1.40 Performance Evaluation. (Defendant Answer to Interrogatory 14). Other white employees with similar records have been more leniently treated,

thus indicating that the record itself is not the true basis for the particular treatment (Joe Shelton Affidavit Paylor Exhibit).

Hurdle should have been allowed access to the office as whites similarly situated. The fact that Hurdle was not allowed in the office during the audit, clearly show that Hurdle was treated differently that the whites similarly situated. Whether after hours access would have enhanced performance or not, Hurdle was entitle to the same benefits as whites similarly situated. Additionally, Howard Freeland and Geoff Christie who were in the same Solid Waste group, entered the DEQ office building during the audit and was shown by the Sonitrol records. DEQ alleged that the necessary business reason was that the audit was in progress and Hurdle was under investigation, which was the reason that Hurdle was not allowed in the office after hours. The audit was over by mid-October and Hurdle was still not allowed in the office until Mid-December (Encl. XXI) (Syverson e-mail). So the legitimate business reason of the existing file audit is false, and the fact that Freeland and Christie entered the office building during the audit clearly show that race and or retaliation is more likely the reason for Hurdle being denied access to the office building to which he was entitle. Additionally, Freeland was under the same investigation as Hurdle concerning the tracking sheet documents (Enclosure XXXV Dewayne Report) however, Hurdle was denoted as the suspect. Freeland had the freedom to request individual tracking sheets (Encl. XVI) and additionally, was allowed to enter the office building during the respective audit that Hurdle was denied. With the

fraudulent activity of document changing (Encl. XVII) Hurdle needed to work more than a forty-hour workweek.

Hurdle presented evidence that whites "similarly situated" were treated better. White employees faced with similar management decisions were treated differently. One white male similarly situated maintained his job. (Peggy Depo pg. 26 line 20-25) (Peggy Affidavit#1). The white male similarly situated was made aware that he would be terminated one day before the termination and HRO found another job within a one-day notice. (Peggy Affidavit #2Def.EnclVIII). The Defendant Alleged that the white male somehow found out he was going to be terminated one day before the scheduled event. Some how this information leaked out to him one day before termination. Because Hurdle was Black, such information didn't leak.

DEQ wrongly terminated Mr. Hurdle as contracted by the Virginia DEQ Employee Handbook. The Virginia DEQ Employee Handbook is generally distributed to all employees and Hurdle had to sign for his handbook in the presence of Carol Harris. No other white non-protected employee has been terminated under DEQ Policy 5-1 or DPT 1.40 Performance Planning and Evaluation. If it was not for Hurdle's race Black. He would have been disciplined under DPT 1.60 Standards of Conduct for inadequate performance as all other whites before him. Inadequate performance under policy 5-1 is a Group I Offense that does not warrant termination.

DEQ elected to implement DPT policy 1.40 VI.D.1 to look for Hurdle another job within the agency (Sismour.griev.hear Pg. 284 lines 23-25). The policy states that at the end of the next two months if no jobs are available or DEQ has elected not to place Hurdle in another job, then he should be removed from state service. DEQ did not follow the written policy and chose to terminate Hurdle immediately after the 90-day re-evaluation period even when they implemented the option. These retaliatory actions would not have occurred against Hurdle if he had not participated in protected activity.

The fact-finding order (Paylor Exhibit 11) [Appendix 8a-9a] clearly denotes what the facts are in qualifying the respective grievance for hearing. The grievance qualified for a hearing based on the implementation of the Standards of Conduct Policy (Appendix 10a-12a). The qualification for the hearing was not based on the Performance Evaluation Policy and did not include the issue of discrimination (Appendix F]. The state policies should apply to everyone, but the policies are ignored with respect to Hurdle because of Hurdle's participation in protected activity and/or his race Black.

The Agency failed to provide a Developmental Plan for Hurdle required by DEQ policy 5-1 and DPT policy 1.40. The Developmental Plan in accordance to DPT policy 5.05 should involve a need assessment to determine the gap between current and desired performance levels. Additionally, the DEQ violated Mr. Hurdle's rights by violating Chapter 10.01 Section 2.1-116.05 of the Code of Virginia. Montana v. United

States, 440 U.S. 147 164, n.11, 99 S.Ct 970, 979, n, 11, 59 L.Ed.2d 210 (1979)

These actions would not have occurred against Hurdle if he had not participated in protected activity.

Plaintiff has been discriminated against and treated different from whites removed from state service. Hurdle has personal knowledge of DEQ employees that have had 2 group III offenses and still maintained their jobs (Mr. Paul Spaulding). Unsatisfactory Performance is discipline as a Group I Offense. Mr. Hurdle had 11 years of satisfactory work performance. Hurdle and has proven he had all of the skills required for the four various jobs held within DEQ, including two separate classifications of Environmental Engineer Senior under two different supervisors independent of Freeland. If it was not for Hurdle's race Black, and the retaliatory motives of DEQ to terminate Hurdle, he would have maintained his job just as Paul Spaulding, and Cynthia Schrass whom had more than one policy infraction of greater than a Group I Offense and maintained their jobs (Peggy Hawkins Affidavit).

Hurdle was faulted for errors in draft letters. Whites similarly situated made errors in final letters that were mailed to clients. (Freeland Depo Exhibit 4) (Freeland Depo. 22 lines 1-20). Additionally, Whites had backlogged correspondences that didn't require them to produce two letters per day until the backlog was completed. (Freeland Exh. 1" Backlog Correspondence). Surely an inference of retaliation and discrimination can be established from the respective facts. All other staff similarly situated had backlogged correspondence, and some for over a year

and were not required to produce over 117 letters in a 3-month period. [Freeland Depo pg.9 line 21-25& pg. 10 line 4-8). That is evidence by Maria Williams who only had 25 sites and had a backlog of Correspondence over two years. Hurdle was required to complete and answer his respective backlog within 90 days. These actions would not have occurred if Hurdle was not a Black man and the retaliatory motive existed. DEQ never offered a legitimate business reason as to why whites similarly situated never had to completely answer their respective backlogs. Hurdle's sites produced more correspondences than whites similarly situated. DEQ concedes that every site does not equal every other site (Def.Encl.X.Romanchik griev.tr.pg 102 line 14-20).

The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to Hurdle since he is the party opposing the motion. Ross, Id., at 364. Only where it is "perfectly clear that there are no issues in the case" is summary judgment proper. As the nonmoving party, Hurdle is entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from the evidence drawn in his behalf; and to be given the benefit of all favorable legal theories invoked by the evidence as considered. Ross at 364.

CONCLUSION

Hurdle's claim's of retaliation for participating in protected activity, discrimination and hostile work environment has never been litigated Appendix (10a-12a).

Virginia law clearly does not give preclusion with respect to constitutional claims that have never been litigated. As footnoted in the Haring v. Posises 103 S.Ct, 2377 (1983). "Although petitioners also contends that a special federal rule of preclusion is necessary to preserve important federal interest, we fail to understand how any such interest justify the adoption of a rule that would bar the assertions of constitutional claims which have never been litigated".

Hurdle did not have a full and fair opportunity to litigate his claim or issue in a State or Federal Court.

Appendix 3a-4a. Moreover, Hurdle clearly expressed in open argument September 6, 2002 that the hostile work environment, Title VII discrimination, or several of the issues of retaliation or were never apart of the original grievance and therefore not a part of the judicial review Appendix [10a-12a]. The judicial review was not decided or the merits. Hurdle is entitled to have claims litigated in court and decided on the merits.

Hurdle has shown a prima facie case and has demanded a jury trial with respect to his Title VII claims. Hurdle is entitled to have a trial by jury for his Title seven claims.

WHEREFORE, Mr. Hurdle requests that the Court rescinds and amends summary judgment.

APPENDICES

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Department of Environmental Quality
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Order of
The United States District Court
For the Eastern District of
Virginia in
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Petition For Rehearing En Banc in
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Letter from the Legal Aid Justice Center
Denying Representation for Hurdle in
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Qualification Ruling of the Director of
the Department of Dispute Resolution for Grievance
of Kelvin J. Hurdle v. Commonwealth of Virginia
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No. 2001-13
entered April 3, 2001 ..... 10a

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-2138

KELVIN J. HURDLE,
Plaintiff - Appellant

Versus

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF ENVIRONMENTAL QUALITY
Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge.
(CA-01-259-3)

Submitted: December 16.2002
Decided: December 19. 2002
[Entered: December 19, 2002]

Before LUTTIG, MICHEAL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Kelvin J. Hurdle, Appellant Pro Se. Martha Murphey Parrish, Assistant Attorney General, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Kelvin J. Hurdle appeals the district court's order dismissing his racial discrimination complaint filed in this employment discrimination action. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Hurdle v. Virginia, No. CA-01-259 (E. D. VA. Sept 25, 2002). We deny Hurdle's motion for appointment of counsel and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KELVIN J. HURDLE

Plaintiff,

v. CIVIL Action No. 3:01cv259

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

ORDER
[Entered: January 5, 2001]

For the reason set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that:

[1] the defendant's Motion for Summary Judgment is granted;

[2] Count IV in its entirety, that part of Count I asserting retaliation in respect of opposition to post-employment benefits, and those parts of Count III asserting the intentional infliction of emotional distress and conspiracy, having been abandoned in open Court, are DISMISSED with prejudice;

[3] The remainder of Counts I and III (not dismissed under paragraph [2] above] and the federal claims in Count II are dismissed without prejudice for lack of jurisdiction;

[4] Alternatively, those Counts referred to in paragraph

[3] above are DISMISSED with prejudice by virtue of the doctrine of collateral estoppel;

[5] The state claims in Count II are DISMISSED without prejudice; and

[6] This action is DISMISSED.

This Order may be appealed by the plaintiff. Any appeal from this decision must be taken by filing a written notice of appeal with the Clerk of the Court within thirty [30] days of the date of entry hereof. Failure to file a timely notice of appeal may result in the loss of the right to appeal.

The clerk is directed to send a copy of this Order to the plaintiff and counsel for the defendant.

It is so Ordered.

/s/ Robert E. Payne
Robert E. Payne
United States District Judge

Richmond, Virginia

Date: January 5, 2001

UNITED STATES COURT OF APPEALS
FOR THE FORTH CIRCUIT

FILED
March 11, 2003

No. 02-2138
CA–01-259

KELVIN J. HURDLE

Plaintiff - Appellant

v.

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF ENVIRONMENTAL QUALITY

Defendants - Appellees

On Petition for Rehearing and Rehearing En Banc

Appellant's petition for rehearing and rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
Patricia S. Connor

CLERK

LEGAL AID JUSTICE CENTER
Richmond Office
101 West Broad Street, Suite 111
Richmond, VA 23220

Lynette Woolfolk
lynette@justice4all.org
(804) 643-1086 or 1-800-496-0365
FAX: [804] 643-2059

October 7, 2002

Kelvin J. Hurdle
5001 Hallmark Court
Richmond, VA 23234

Re: Kelvin J. Hurdle v. Dept. Environmental Quality

Dear Mr. Hurdle:

It was determined that there was insufficient merit for this office to represent you with your employment matter. Your case file is being close.

I have enclosed your original documents that are being returned to you need additional legal services in the future.

Sincerely,

Lynette Woolfolk
Legal Assistant

[Page 110 from transcript of the grievance hearing Hurdle v. DEQ]

* * *

Q Okay. So in that sense he's responsible for quantity, at this time frame 76?
A But if you look back at the performance standards, it doesn't say complete all, send out a letter on every annual report that's assigned for every facility that's assigned to you. It says review and annual report within four hours and meets the technical criteria.

Q So if he was assigned 76 facilities and he only did one, he did it in four hours and did it perfectly, are you telling me that he would have gotten an excellent evaluation?

A Probably not, but it's not the criteria.

Mr. Crowley: That's all I have.

(Line 14-15) **The COMMISSIONER**: <u>There's a flag in every direction.</u>

Ms. Black: That's all I have.

The COMMISSIONER: One question I had, I can't remember what it was now, -- oh, on the four hour business, is it four hours average? In other words is it expected that in some cases he might do an annual report in one hour others might take six, but on average it should be not more that four?

A No, it's not an average that way, it's an average that sometimes it may take you an hour and sometimes it may take you up to four hours, but it should never take you over for hours.

* * *

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Environmental Quality / No. 2001-13

April 3, 2001

The grievant has requested a ruling on whether his November 17, 2000 grievance with the Department of Environmental Quality (DEQ) qualifies for a hearing. In this grievance, the grievant claims that his 2000 performance evaluation is arbitrary, capricious, and retaliatory. For the reasons discussed below, this grievance is consolidated with the grievant's February 14, 2001 grievance (which has automatically qualified for hearing), and both grievances will be heard together by one hearing officer.

FACTS

In September 2000, the grievant received his 1999-2000 performance evaluation with an overall rating of Does Not Meet Expectations. The evaluation consisted of six job elements upon which the grievant's performance was rated. He received a rating of Does Not Meet Expectations in each of the six categories.

On January 16, 2001, the agency terminated the grievant under the Standards of Conduct for alleged poor job performance. On February 14,2001, the

grievant filed a second grievance challenging his performance-based termination as wrongful, unfair, and retaliatory.

This second grievance, which also involves the grievant's September 2000 performance evaluation, has automatically qualified for a hearing. A hearing on this second grievance has not yet been held.

DISCUSSION

This Department has the authority to consolidate grievances on it own accord and does so when consolidation promotes judicial economy and a more comprehensive understanding of the disputed issues. This is such a case. The issue of the grievant's performance is central to both of his grievances. Thus, the factual issues presented by each grievance are significantly intertwined. Indeed, it may be that the first grievance has now been subsumed by the second. In any event, a hearing officer has already been appointed to determine whether the performance-based termination was warranted and appropriate under the circumstances. It is therefore reasonable under the unique circumstances of this case for the hearing officer to review as well the issue of whether the grievant's September 2000 performance evaluation is arbitrary, capricious or retaliatory.

At hearing, with respect to the February 14, 2001 grievance, the agency will have the burden of proving by a preponderance of the evidence, that the February 2001 termination was "warranted and appropriate under the circumstances." The hearing officer may

either uphold, reduce, or rescind the termination. With respect to the November 27, 2000 grievance, the grievant must prove by a preponderance of the evidence that his September 2000 evaluation was arbitrary, capricious, or retaliatory. If the hearing officer so finds, he may direct the agency to redo the September 2000 evaluation on an objective basis related to the performance expectations in the grievant's performance plan. The hearing officer may not substitute his judgment for that of management by ordering that a specific performance rating be given.